

1 evidence is abundantly clear that this man is in fact
2 the triggerman in both cases.

3 Had it not been, had it not
4 been for Lieutenant Steve Miller, those three guys would
5 have gotten away and another man would have been dead
6 just like it happened that morning. All of these people
7 are cold, cold calculating people. And for this man to
8 assert in some fashion that he's just along for the ride
9 is totally ridiculous.

10 You know, another thing you
11 want to take a look at, five bullets. We will put them
12 right here.

13 I know it's not the Raven.
14 We know it's the Bryco. We know the Raven is documented
15 as to Mr. Polson. We know that the gunshot inside
16 Mr. Blazer's house is the Raven. I think that's
17 undisputed. We know that the four bullets that were
18 fired outside all came from the Bryco as testified by
19 Marshal Manning and Carl Haemmerle. And who's outside,
20 Weston Lee Howe, Junior. Who's inside, Polson and
21 Elofskey. You can get down and nitpick all you want to,
22 all these little facts of inconsistencies and whatnot.
23 When you break this case down to its basic elements, who
24 is inside Tennyson and who's outside Tennyson, you got,
25 it's undisputed, is direct uncontroverted evidence, that

1 as to the Tennyson situation, Elofskey goes inside,
2 Polson goes inside, and this man is the one that's
3 outside. He's the outside man. He's to be let in.
4 That makes sense. It's uncontroverted evidence. Polson
5 is inside, obviously. He's in there as Tommy. Elofskey
6 is inside because he knew Mr. Blazer. And just like
7 that was spoken, Howe is outside to be let in later.
8 They need the two guys to go in under the pretext of
9 what they were going to do, whatever it was. This guy
10 is waiting outside.

11 And, you know, if you think
12 about the video, you know the thing that about
13 Mr. Polson, if you recall his video or maybe it was his
14 testimony, I pulled my gun and the guy just looked at
15 me. I fired the gun. And he just looked at me. He
16 scared me. You know. Remember that? Now, is that guy,
17 Walter Polson, so smart that he could put on some show
18 like that and then later on in the thing burp and asked
19 to be excused. You know, you saw him on the video, you
20 saw it. The guy -- you know, show me where there is a
21 fabrication.

22 So I guess the defense
23 would have you believe that Tony ran out and didn't
24 shoot him inside but ran outside and shot him as he came
25 out that door. Doesn't make sense either as I think

1 about it. No, because it didn't happen that way. Tony
2 comes out, yeah, to let Howe in. Now Blazer is right
3 behind him. Howe is, Howe is by the bushes, shoots
4 three or four times, right to left, just like the
5 coroner said. The coroner could not tell us of the
6 position of the shooter or the victim in any situation.
7 We don't know. Mr. Arntz would have you believe that
8 the guy was standing straight up like parallel like the
9 lawyer was when he was asking the questions. You will
10 have Mr. Howe, and Mr. Blazer was walking, we don't know
11 exactly whether the shooter was rising up, having risen
12 up. The first went to the ground and went to him, we
13 don't know.

14 What else do we know about
15 some physical evidence. We know from Walter Polson and
16 Tony Elofskey, think about this, from June 23rd when
17 they're being interviewed, you know, talking about the
18 number of shots fired. You know, one guys says he
19 emptied the clip. We are not sure that kind of stuff,
20 you know. And how many shots were fired outside. Well,
21 one guy says I shot one out, may have fired one outside.
22 How many did your brother shoot? Four or five.
23 Remember that.

24 When the Bryco is examined
25 down at the crime lab by Taulbee, we know that the

1 Raven -- the Bryco when fully loaded holds seven in the
2 magazine. How many did it have when Haemmerle looked at
3 it. Three. How many were fired? Four.

4 What about the Raven? The
5 Raven holds fully loaded in the magazine, six. How many
6 did it have? Five. I submit how many were fired?
7 One. All consistent with what Polson and basically
8 Elofskey said to you.

9 You know, another thing
10 that is he talks about, the defense lawyer does, did
11 about Mr. Elofskey and Mr. Polson, I forget his exact
12 word, I think it was, I'm sorry, carefully prepared and
13 teammates. Well, you saw them. You saw them. Now you
14 take a look, are those two guys smart enough to
15 fabricate some type of story like this to put all this
16 on Weston Lee Howe and at the same time inculcate
17 themselves totally in both of these crimes where they
18 even have to plead guilty to two counts of aggravated
19 murder. These guys are no brain trusts. These guys
20 couldn't concoct the story that Mr. Arntz thinks that
21 they did and wants you to believe that they did if they
22 had to. You saw them. You saw them after they've had,
23 I mean, maybe if you add them both together, at least
24 ten hours of cross-examination, ten hours with the
25 cross-examination and those guys, if you think about it,

1 their facts as what they said to you and what they said
2 to the detectives and on their video is fairly close to
3 being the same thing, minor variances, you know. If,
4 and if there were no variances, what the defense would
5 then be saying, well, they were, by golly, they were so
6 rehearsed, it was like a broken record.

7 You have to take a look at
8 the basis for their complaints. And if you take a look,
9 take a look at all the physical evidence, the arguments,
10 the theory of the defense, I submit, is unreasonable.

11 You know when you take a
12 look at circumstantial evidence, you will be asked to
13 look at it. When you look at it, you have to look at
14 the theory of defense even to see if and determine
15 circumstantial evidence or other evidence to see if it's
16 reasonable to begin with. If it's not reasonable, their
17 theory or of defense is not reasonable, you don't even
18 need to be concerned with anything else as to the
19 circumstantial evidence.

20 MR. ARNTZ: Objection to that comment.

21 THE COURT: Overruled.

22 You may proceed.

23 MR. SLAVENS: You know, this is
24 cross-examination. You have to compliment Mr. Arntz
25 as to the fact he's doing his job. He's attempting

1 and has given Mr. Howe a fair trial, a fair argument.
2 But even after ten hours, Polson and Elofskey, they
3 haven't, he hasn't shown any, any major inconsistency,
4 many variances, the basic elements as to who did the
5 shooting from day one.

6 But I guess he wants you to
7 believe these guys are smart enough to way back even
8 before going into Mr. Blazer's house, that they had
9 this plan to, one, kill him; two, get caught; three,
10 confess; and four, to put it on Howe. Folks, Polson
11 and Elofskey, they don't think that way. You use good
12 sense of reason every day of your life. Does that
13 even have any remote scintilla to being sensible to
14 you as to how these two guys think and operate?

15 And then if they're going
16 to make a fall guy, this is what the bizarre part of
17 the defense is, they're going to preplan a fall guy,
18 but yet at the same time they're going to implicate
19 themselves in everything that went on. It doesn't, it
20 doesn't jive here.

21 We have Polson, you know,
22 he doesn't even try to protect himself, so why does he
23 need a fall guy? Polson says, yeah, I was part of the
24 plan in Mark McDonald's robbery. I ducked down in the
25 back seat. I ran after Mark. I got the property. I

1 went to the Green Machine. Polson also says, Tony
2 Elofskey also planned it. Tony Elofskey was driving.
3 We all had the joint idea, the idea was to duck. We
4 drove over -- Tony drove over to the gravel pit,
5 talked to the man and drove the getaway car. Now,
6 there is no fall guy. He included himself in
7 everything he said. But yet the defense lawyer wants
8 you to believe these guys conjured up a fall guy.

9 Polson is not protecting
10 himself. He's not protecting Tony Elofskey. He's not
11 protecting Weston Lee Howe. He's telling the police
12 officer at that time and he opened up and he said,
13 that the shooting of Mark McDonald was Weston Lee
14 Howe. And it makes sense.

15 The lawyer talks about how
16 can you get in a small car. Another thing about that,
17 the demonstration on the video by Elofskey as to how
18 Howe was situated in that little car, down, and he
19 fires. And our ballistics man indicated that out of
20 the muzzle of the barrel is going to go, the gun
21 powder, so depending on how close that barrel of that
22 muzzle, not that gun but the muzzle, the very end
23 point is, it's all going to go out the window. And if
24 Mr. McDonald is 3 feet or so away from that window,
25 and what's 3 feet, arms length, he's not going to get

1 that much on him. And what did he get, he got a
2 little bit of stippling around the skin area of his
3 mouth and nothing on his clothing and on his hands.
4 It all fits.

5 If these guys are planning
6 a fall guy, why doesn't Polson say, well, Weston Lee
7 Howe and I was there. And Tony Elofskey wasn't there.
8 You know, see, it just doesn't jive. It doesn't make
9 sense when you look at it.

10 Same thing with Tony
11 Elofskey. When he's interviewed by the police, he
12 says, yeah, my car was stolen and these guys stole my
13 car. Police said, we don't buy that. Okay, I will
14 tell you the truth. Same story.

15 Now I'm going to ask, if
16 these guys, you saw them, they're not college
17 graduates, how are they able to do this? You saw
18 these guys --

19 THE COURT: We are at time.

20 MR. SLAVENS: Pardon?

21 THE COURT: We are at time.

22 MR. SLAVENS: You take a look at what
23 these guys said. You take a look at the physical
24 evidence. Use your own sense of reason, logic and
25 common sense.

And remember just a couple of things Walter Polson said when being pressed, said, the truth is my brother shot and killed those two people. Tony Elofskey said, hey, I was down for a robbery but not a murder. And that's why these guys are here, these, why these guys are convicted, that's why they're telling you what happened. Elofskey said, hey, I ain't got a deal, my lawyers weren't even that good. To him, what has happened is no deal.

You take a look at the fact that Elofskey and Polson never once, never once tried to exculpate themselves from what happened and then you take a look over here, take a look at who tried to exculpate themselves from what happened. What do you think? Oh, I was there but it was an accident. Then the second one, Mr. Blazer, I was there but I tried to stop it. And at a time when he's wearing all of this.

Folks, I think after you see it all, analyze it all and listen to all the instructions of the Court, you will be firmly convinced, right here, like this guy, of the truth of all the charges against Weston Lee Howe, Junior, and we ask you to find him guilty of all charges.

Thank you.

Thank you, your Honor.

1 THE COURT: Thank you, Mr. Slavens.

2 Ladies and gentlemen of the
3 jury, the next stage in the proceedings is not too
4 lengthy but reasonably lengthy instructions to you on
5 the law. So let's take a break so you can move around
6 a little bit but don't leave the immediate jury area.
7 We are going to try to keep it down to approximately
8 five, six minutes just so you can get your blood
9 circulating again, get your attention. And we'll come
10 back in at that point, do the instructions, and then
11 you will have the case and we'll go from there.

12 Remember, we are not done
13 yet, do not form any opinions, do not discuss the case
14 among yourselves or with anybody else. See you back
15 in about five minutes.

16
17 (WHEREUPON, a recess was taken at the hour
18 of 12:17 p.m.)
19
20
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24
25

IN OPEN COURT - BEFORE THE JURY

1
2 THE COURT: Ladies and gentlemen, I
3 will now give you the instructions that apply to this
4 case. This is the law that involves this entire
5 situation. Stay calm, listen, I will try to use nice,
6 plain words. It's very precise, so I must read it to
7 you. Remember to take the instructions as a whole.
8 Don't highlight one piece of the instruction over
9 another.

10 Ladies and gentlemen of the
11 jury, you have heard the evidence and the arguments of
12 counsel. It is now my duty to instruct you on the law
13 which applies to this case. The Court and jury have
14 separate functions: you decide the disputed facts, the
15 Court provides the instructions of law. It is your
16 sworn duty to accept these instructions and to apply
17 the law as it is given to you. You are not permitted
18 to change the law, nor to apply your own conception of
19 what you think the law should be.

20 A criminal case begins with
21 the filing of an indictment. The indictment informs
22 the defendant that he has been charged with a crime or
23 crimes. The fact that it was filed may not be
24 considered for any other purpose. The plea of not
25 guilty is a denial of the charges and puts in issue

1 all of the essential elements of each charge or crime.

2 The defendant is presumed
3 innocent until his guilt is established beyond a
4 reasonable doubt. The defendant must be found not
5 guilty unless the State produces evidence which
6 convinces you beyond a reasonable doubt of every
7 essential element of each crime charged in the
8 indictment.

9 Now reasonable doubt is
10 present when, after you have carefully considered and
11 compared all the evidence, you cannot say you are
12 firmly convinced of the truth of the charge.
13 Reasonable doubt is a doubt based on reason and common
14 sense. Reasonable doubt is not mere possible doubt,
15 because everything relating to human affairs or
16 depending on moral evidence is open to some possible
17 or imaginary doubt. Proof beyond a reasonable doubt
18 is proof of such character that an ordinary person
19 would be willing to rely and act upon it in the most
20 important of his or her own affairs.

21 If after a full and
22 impartial consideration of all the evidence you are
23 firmly convinced of the truth of the charge, the State
24 has proved its case beyond a reasonable doubt. If you
25 are not firmly convinced of the truth of the charges,

1 you must find the defendant not guilty of that
2 particular count. I will get to that in a minute.

3 Remember we are dealing
4 with several counts, so if I talk in the singular,
5 remember I mean the plural. All of these instructions
6 apply to each count and I will get into each count
7 specifically in just a little bit.

8 Evidence is all the
9 testimony received from the witnesses and the exhibits
10 admitted during the trial.

11 Evidence may be direct or
12 circumstantial, or both.

13 Direct evidence is the
14 testimony given by a witness who has seen or heard the
15 facts to which he or she testifies. It includes
16 exhibits admitted into evidence during trial.

17 Evidence may also be used
18 to prove a fact by inference. This is referred to as
19 circumstantial evidence. Circumstantial evidence is
20 the proof of facts by direct evidence from which you
21 may infer other reasonable facts or conclusions.
22 Where the evidence is both direct and circumstantial,
23 the combination of the two must satisfy you of the
24 defendant's guilt beyond a reasonable doubt. You may
25 not make one inference from another inference but you

1 may draw more than one inference from the same facts
2 or circumstances. If the circumstances create
3 inferences that are equally consistent with the
4 defendant being guilty or not guilty, such inferences
5 must be resolved in favor of the defendant.

6 The evidence does not
7 include the indictment or the opening statements or
8 closing arguments of counsel. The opening statements
9 and closing arguments of counsel are designed to
10 assist you, they are not evidence.

11 Evidence stricken by the
12 Court or for which you were instructed to disregard is
13 not evidence and must be treated as though you never
14 heard it. You must not speculate as to why the Court
15 sustained an objection to any question or to what the
16 answer to such question might have been. You must not
17 draw any inference or speculate on the truth of any
18 suggestion included in a question that was not
19 answered.

20 You are the sole judges of
21 the facts, the credibility of the witnesses and the
22 weight of the evidence.

23 To weigh the evidence, you
24 must consider the credibility of the witnesses. You
25 will apply the tests of truthfulness which you apply

1 in your daily lives.

2 These tests include the
3 demeanor and appearance of each witness upon the
4 stand; his or her manner of testifying; the
5 reasonableness of the testimony; the opportunity he or
6 she had to see, hear and know the things concerning
7 that which was testified to; the accuracy of memory;
8 frankness or lack of it; intelligence, interest and
9 bias, if any; together with all the facts and
10 circumstances surrounding the testimony. Applying
11 these tests, you will assign to the testimony of each
12 witness such weight as you deem proper.

13 It is not necessary that
14 the defendant take the witness stand in his own
15 defense. He has a constitutional right not to
16 testify. The fact that he did not testify must not be
17 considered by you for any purpose.

18 Certain law enforcement
19 officials or officers appeared as witnesses. The
20 Court simply tells you that their testimony is to be
21 weighed by the same rules that apply to other
22 witnesses and is to be governed by those rules. Their
23 testimony is entitled to the same credence as any
24 witness under similar or like conditions.

25 A number of exhibits and

1 testimony relating to the exhibits have been
2 introduced and received. You may consider whether the
3 exhibits are the same objects and are in the same
4 condition as originally taken by the particular
5 witness or police officer. You will determine what
6 weight, if any, the exhibits should receive in light
7 of all the evidence.

8 In this case we have
9 received testimony from expert witnesses. It is
10 proper for the Court to instruct you with reference to
11 that particular type of testimony.

12 Generally, a witness may
13 not express an opinion, but these individuals are
14 permitted to express opinions because of their
15 specialized knowledge, education and experience. The
16 purpose of such testimony is to assist you in arriving
17 at a just verdict.

18 However, as with other
19 witnesses, upon you alone rests the duty of
20 determining what weight should be given to the
21 testimony of these experts.

22 You are not required to
23 believe the testimony of any witness simply because he
24 or she was under oath. You may believe or disbelieve
25 all or any part of the testimony of any witness. It

1 is your province to determine what testimony is worthy
2 of belief and what testimony is not worthy of belief.

3 Evidence has been received
4 concerning a statement or statements that are said to
5 have been made by the defendant. It is for you to
6 determine whether the defendant did in fact make the
7 statement or statements. If you find that the
8 defendant did make the statements, then you must
9 determine what weight, if any, you feel the statement
10 or statements deserve. In determining what weight if
11 any should be given the statement or statements, you
12 should consider all the matters in evidence.

13 In this case you have also
14 heard the testimony from Mr. Tony Elofskey and
15 Mr. Walter Polson, other persons who pleaded guilty to
16 the same crime charged in the case, and they are said
17 to be accomplices.

18 An accomplice is one who
19 purposely assists another in the commission of a
20 crime. Whether Mr. Elofskey or Mr. Polson were
21 accomplices and the weight to be given each of their
22 testimony are matters for you to determine from all
23 the facts and circumstances in evidence.

24 The testimony of an
25 accomplice does not become inadmissible because of his

1 complicity, moral turpitude, or self-interest, but the
2 admitted or claimed complicity of a witness may affect
3 his credibility and make his testimony subject to
4 grave suspicion and require that it be weighed with
5 great caution.

6 It is for you, as jurors,
7 in the light of all the facts presented to you and
8 from the witness stand, to evaluate such testimony and
9 to determine its quality and worth or its lack of
10 quality and worth.

11 An accomplice may have
12 special motives in testifying, and you should
13 carefully examine an accomplice's testimony and use it
14 with great caution and view it with grave suspicion.

15 The law provides two bases
16 that may place criminal responsibility upon this
17 particular defendant. The first basis is that the
18 defendant did all the acts which make up all the
19 elements of the particular offense charged in a
20 particular count. Second basis, that the defendant
21 aided and abetted one or more other persons in
22 committing these offenses knowing that he was
23 facilitating the offenses charged in the several
24 counts of the indictment. Again, the State must prove
25 each and every element beyond a reasonable doubt of

1 only one of the two theories for the defendant to be
2 found guilty as charged to any one or more of these
3 offenses. If you find that the State proved beyond a
4 reasonable doubt all the essential elements of the
5 offense or offenses charged in the indictment, your
6 verdict must be guilty as to that particular offense.
7 Or if you find beyond a reasonable doubt that another
8 person or persons committed any one or more of the
9 offenses charged in the indictment, then you may
10 consider whether or not the defendant aided and
11 abetted in the offense or offenses that you have found
12 beyond a reasonable doubt to have been committed.

13 An aider and abettor is a
14 person who purposely aids or associates himself with
15 another person or persons for the purpose of
16 committing an offense. Such person is regarded as if
17 he were the principal offender and is just as guilty
18 if he personally performed every act constituting the
19 offense. When two or more persons have a common
20 purpose to commit a crime and one does one part and
21 one does another, those acting together are equally
22 guilty of the crime.

23 Now I'm going to give you a
24 very brief definition of purpose and I will go into
25 more detail. Now, I've used purposely. Now I want to

1 make sure you understand what I'm talking about when I
2 use that word as it relates to aider and abettor.

3 A person acts purposely
4 when it is his specific intention to cause a certain
5 result. With regard to the second alternative, it
6 must be established that there was present in the mind
7 of the defendant a specific intention to aid and abet
8 another in the commission of any one or more of the
9 offenses charged and as defined in these instructions.
10 Mere presence at the scene of a crime is not
11 sufficient to establish that the defendant committed
12 any crime himself.

13 Now at this point I'm going
14 to go through each of the separate counts and define
15 certain words for you.

16 The defendant is charged
17 with two counts of aggravated murder; two counts of
18 aggravated robbery; and one count of aggravated
19 burglary. Each count carries a separate firearm
20 specification.

21 Now as to Count One. The
22 defendant, Weston Lee Howe, Junior, is charged with
23 aggravated murder in count one of the indictment.

24 Aggravated murder is
25 purposely causing the death of another while

1 committing or in fleeing immediately thereafter the
2 offense of aggravated robbery.

3 Before you can find the
4 defendant guilty, you must find beyond a reasonable
5 doubt that Weston Lee Howe, Junior, on or about the
6 22d day of June, 1992, and in Montgomery County, Ohio,
7 that the defendant purposely caused the death of Mark
8 McDonald while the defendant was committing or fleeing
9 immediately thereafter the offense of aggravated
10 robbery.

11 Now before I go to
12 definitions, I'm going to talk about Count Two. The
13 defendant, Weston Lee Howe, Junior, is charged with
14 aggravated murder in Count Two of the indictment.
15 Again, aggravated murder is purposely causing the
16 death of another while committing or fleeing
17 immediately thereafter the offense of aggravated
18 robbery.

19 Before you can find the
20 defendant guilty, you must find beyond a reasonable
21 doubt that Weston Lee Howe, Junior, on or about the
22 22d day of June, 1992, and in Montgomery County, Ohio,
23 purposely caused the death of Richard Blazer while the
24 defendant was committing or fleeing immediately
25 thereafter the offense of aggravated robbery.

1 Now I'm going to define the
2 terms for you as it relates to this charge. Keep in
3 mind there are two separate counts. These definitions
4 that I'm about to give you apply to both counts.

5 Purpose - to cause the
6 death of another is an essential element of the crime
7 of aggravated murder. A person acts purposely when it
8 is his specific intention to cause a certain result.
9 It must be established in this case that at the time
10 in question there was present in the mind of the
11 defendant a specific intention to cause the death of
12 Mark McDonald in Count One, and the specific intention
13 to cause the death of Richard Blazer in Count Two.

14 Purpose is a decision of
15 the mind to do an act with a conscious objective of
16 producing a specific result or engaging in specific
17 conduct. To do an act purposely is to do it
18 intentionally and not accidentally. Purpose and
19 intent mean the same thing. The purpose with which a
20 person does an act is known only to himself unless he
21 expresses it to others or indicates it by his conduct.

22 The purpose with which a
23 person does an act or brings about a result is
24 determined from the manner in which it is done, the
25 means used and all the other facts and circumstances

1 in evidence.

2 No person shall be
3 convicted of aggravated murder unless he is
4 specifically found to have intended to cause the death
5 of another. Specific intent to cause the death of
6 another may be inferred from the facts that the
7 defendant engaged in a common design with others to
8 commit the offense of aggravated robbery and that the
9 defendant either knew that an inherently dangerous
10 instrumentality was to be employed to accomplish the
11 offense or that the offense or matter of
12 accomplishment would be reasonably likely to produce
13 death. The inference is nonconclusive. The inference
14 may be considered in determining intent. You may
15 consider all of the evidence to indicate the
16 defendant's intent or lack thereof.

17 Again, the State must prove
18 the defendant's specific intent to cause death by
19 proof beyond a reasonable doubt.

20 Cause. Cause is an
21 essential element of the offense charged. The State
22 charges that the acts of the defendant caused the
23 death of Mark McDonald in Count One, and caused the
24 death of Richard Blazer in Count Two.

25 Cause is an act which is in

1 the natural and continuous sequence directly produces
2 the death and without which it would not have
3 occurred. Cause occurs when the death is a natural
4 and foreseeable result of the act or failure to act.

5 The death is a result of an
6 act when it is produced directly by an act in a
7 natural and continuous sequence and would not have
8 occurred without the act. Result occurs when the
9 death is naturally and foreseeably caused by the act.

10 The causal responsibility
11 of the defendant for an unlawful act is not limited to
12 its immediate or most obvious result. He is
13 responsible for the natural and logical and
14 foreseeable results that follow, in the ordinary
15 course of events, from the unlawful act.

16 The test for foreseeability
17 is not whether the defendant should have foreseen the
18 injury in its precise form or as to a specific person.
19 The test is whether a reasonably prudent person, in
20 the light of all the circumstances would have
21 anticipated the death was likely to result to anyone
22 from the performance of the unlawful act.

23 Now on this count, or
24 Counts One and Two, as in the remaining three counts,
25 there are firearm specifications. I'm going to get

1 into this now. I'm going to define it once, but
2 remember, the firearm specification applies to all
3 five counts.

4 If your verdict is guilty
5 on any count, you will separately determine whether
6 the defendant had a firearm on or about his person or
7 under his control while committing the offense or
8 offenses charged in the indictment.

9 Firearm means any deadly
10 weapon capable of expelling or propelling one or more
11 projectiles by the action of an explosive of
12 combustible propellant. A firearm includes any
13 unloaded firearm or any firearm which is inoperable
14 but which can readily be rendered operable.

15 When deciding whether a
16 firearm is capable of expelling or propelling one or
17 more projectiles by the action of an explosive or a
18 combustible propellant, you may rely on the
19 circumstantial evidence including but not limited to
20 the representations of the individual exercising
21 control over that firearm.

22 On or about his person
23 means that the firearm was either carried on the
24 defendant's person or was concealed ready at hand.

25 Ready at hand or under his

1 control means so near to defendant's person as to be
2 conveniently accessible and within his immediate
3 physical reach.

4 As to Counts One and Two of
5 the indictment, if you find that the State proved
6 beyond a reasonable doubt all the essential elements
7 of the offense of aggravated murder, your verdict must
8 be guilty as charged.

9 Now remember, these are two
10 separate offenses I will deal with that eventually,
11 but I want to emphasize again, each count is a
12 separate and distinct offense each from the other.

13 However, if you find that
14 the State failed to prove beyond a reasonable doubt
15 all the essential elements of the offense of
16 aggravated murder in Count One or in Count Two, then
17 your verdicts must be not guilty of that offense, and
18 in that event, you will continue your deliberations to
19 decide whether the State has proved beyond a
20 reasonable doubt all the essential elements of the
21 lesser included offense of involuntary manslaughter.

22 If all of you are unable to
23 agree on a verdict of either guilty or not guilty of
24 aggravated murder, then you will continue your
25 deliberations to decide whether the State has proved

1 beyond a reasonable doubt all the essential elements
2 of the lesser included offense of involuntarily
3 manslaughter.

4 The offense of aggravated
5 murder is distinguished from involuntary manslaughter
6 by the absence of the purpose to cause the death.

7 I'm going to define for you
8 what involuntary manslaughter is. It's pretty much as
9 basic as that.

10 Involuntary manslaughter is
11 causing the death of another as a proximate result of
12 committing a felony. Before you can find the
13 defendant guilty of involuntary manslaughter, you must
14 find beyond a reasonable doubt that on or about the
15 22d day of June, 1992, and in Montgomery County, Ohio,
16 the defendant caused the death of another as the
17 proximate result of committing a felony. The felony
18 in this situation would be either aggravated robbery
19 as it relates to Mark McDonald, or aggravated robbery
20 or aggravated burglary as it relates to Count Two,
21 Richard Blazer.

22 I've already defined cause.
23 I won't repeat that now.

24 If you find that the State
25 proved beyond a reasonable doubt all of the essential

1 elements of the offense of involuntary manslaughter,
2 your verdict must be guilty as to that offense. If
3 you find that the State failed to prove beyond a
4 reasonable doubt any one of the essential elements of
5 the offense of involuntary manslaughter, your verdict
6 must be not guilty as to that offense.

7 Now, if the evidence
8 warrants it, you may find the defendant guilty of an
9 offense lesser than that charged in the indictment.
10 However, notwithstanding this right, it is your duty
11 to accept the law as given to you by the Court and if
12 the facts and the law warrants a conviction of the
13 offense charged in the indictment, in this case Counts
14 One and Two of aggravated murder, then it is your duty
15 to make such finding uninfluenced by your power to
16 find a lesser offense.

17 This provision is not
18 designed to relieve you from the performance of an
19 unpleasant duty. It is included to prevent failure of
20 justice if the evidence fails to prove the original
21 charge but does justify a verdict for the lesser
22 offense.

23 The defendant is charged,
24 in addition, with one count of aggravated burglary in
25 Count Five of the indictment. Before you can find the

1 defendant guilty of Count Five, you must find beyond a
2 reasonable doubt that on the 22d day of June, 1992,
3 and in Montgomery County, Ohio, the defendant by
4 force, stealth, or deception trespassed in an occupied
5 structure with purpose to obtain property owned by
6 Richard Blazer without his consent and to deprive him
7 of that property and that at that time the occupied
8 structure involved was the permanent or temporary
9 habitation of another and in which any person was
10 present or likely to be present.

11 Some definitions.

12 You will note there are
13 alternative methods of entrance. Force. Force means
14 any violence, compulsion or constraint physically
15 exerted by any means upon or against the person or
16 thing to gain entrance.

17 Stealth means any secret,
18 sly or clandestine act to gain entrance.

19 Deception means knowingly
20 deceiving or causing another to be deceived by any
21 false or misleading misrepresentation or by any other
22 conduct, act or omission which creates, confirms, or
23 perpetuates a false impression in another to gain
24 entrance.

25 Trespass. Any entrance

1 knowingly made into a residence or dwelling of another
2 is unlawful if it is without authority, consent or
3 privilege to do so.

4 Knowingly means that the
5 defendant was aware of what he was doing and his lack
6 of authority or privilege.

7 Occupied structure means
8 any house or building or any portion thereof which is
9 maintained as a permanent or temporary dwelling even
10 though it is temporarily unoccupied and whether or not
11 any person is present.

12 Purpose. I've already
13 defined purpose for you. I will not define that
14 again.

15 A theft offense. Simply
16 stated, a theft offense is when a person knowingly
17 obtains or exerts control over property of another
18 with purpose to deprive the owner of such property
19 without the consent of the owner.

20 Habitation means the place
21 where a person lives.

22 Now, in addition, the
23 defendant is charged with two counts of aggravated
24 robbery. I took them out of order. You understand
25 that I'm going to move back to Counts Three and Four.

Aggravated robbery. Before you can find the defendant guilty of any one or both of these counts, you must find beyond a reasonable doubt that on or about the 22d day of June, 1992, and in Montgomery County, Ohio, the defendant knowingly obtained or attempted to obtain or fled immediately after obtaining or fled immediately after attempting to obtain property owned by another without his consent and for the purpose of depriving him of that property and that the defendant had a deadly weapon on or about his person or under his control.

I've already given you the definition of theft offense. I will not repeat it again.

Attempt. A criminal attempt is when a person does an act or omits to do something which is an act or an omission constituting a substantial step in a course of conduct planned to culminate in his commission of a crime to constitute a substantial step. The conduct must be strongly corroborative of the actor's criminal purpose.

The act of having the deadly weapon on or about his person or under his control or the act of inflicting or attempting to inflict serious physical harm must occur as part of

1 the sequence of acts leading up to or occurring during
2 or immediately after the theft or attempted theft
3 offense.

4 A deadly weapon. Deadly
5 weapon means any instrument, device or thing capable
6 of inflicting death and designed or specifically
7 adapted for use as a weapon or possessed, carried, or
8 used as a weapon.

9 A deadly weapon is any
10 instrument, device, or thing which has two
11 characteristics. First characteristic is that it is
12 capable of inflicting or causing death. The second
13 characteristic is in the alternative either the
14 instrument, device, or thing was designed or
15 specifically adapted for use as a weapon or it was
16 possessed, carried or used in this case as a weapon.
17 These are questions of fact for you to determine.

18 Proof of fear or
19 apprehension on the part of the person against whom
20 the weapon is used or threatened is not required.

21 I've just defined
22 aggravated robbery. That is Count Three which relates
23 to Mark McDonald. Count Four as it relates to Richard
24 Blazer.

25 Again, I'm going to repeat

1 this again. If you find that the State proved beyond
2 a reasonable doubt all the essential elements of any
3 one or more of the offenses charged in the separate
4 counts in the indictment, your verdict must be guilty
5 as to such offense or offenses according to your
6 findings. If you find that the State failed to prove
7 beyond a reasonable doubt any one of the essential
8 elements of any one or more of the offenses charged in
9 the separate counts of the indictment, your verdict
10 must be not guilty as to such offense or offenses
11 according to your findings as to each count.

12 The charges set forth in
13 each count in the indictment constitute a separate and
14 distinct matter. You must consider each count and the
15 evidence applicable to each count separately and you
16 must state your findings as to each count uninfluenced
17 by your verdict as to the other counts or any other
18 counts.

19 The defendant may be found
20 guilty or not guilty of any one or all of the offenses
21 charged.

22 You may not discuss or
23 consider the subject of punishment. Your duty is
24 confined to the determination of the guilt or not
25 guilt of the defendant on each separate count.

1 In the event you find the
2 defendant guilty, the duty to determine the punishment
3 is placed, by law, upon the Court.

4 You must not be influenced
5 by any consideration of sympathy or prejudice. It is
6 your duty to carefully weigh the evidence, to decide
7 all the disputed facts, to apply the instructions of
8 the Court to your findings and to render your verdicts
9 accordingly. In fulfilling your duty, your efforts
10 must be to arrive at just verdicts. Consider all of
11 the evidence and make your findings with intelligence
12 and impartiality and without bias, sympathy or
13 prejudice so that the state of Ohio and the defendant
14 will feel that their case was fairly and impartially
15 tried.

16 If, during the course of
17 the trial, the Court said or did anything that you
18 consider an indication of the Court's view on the
19 facts, you are specifically instructed to disregard
20 it.

21 Now you will have with you
22 in the jury room, in addition to the exhibits, several
23 verdict forms. I'm going to go over these verdict
24 forms with you now and I will read each one of them as
25 it relates to each count.

1 The verdict form is
2 captioned State of Ohio vs. Weston Lee Howe, Junior,
3 Count One. And it's labeled in the upper right-hand
4 corner, Count One, aggravated murder, and then in
5 parenthesis, Mark McDonald. That is for
6 identification purposes so you know which count, which
7 situation you're referring to as it relates to your
8 deliberations and ultimate verdict.

9 The verdict reads as
10 follows: We, the Jury, upon the issues joined in this
11 case, do find the defendant, Weston Lee Howe, Junior,
12 and then there is a space with an asterisk and down
13 below it says: Insert in ink guilty or not guilty, of
14 the offense of aggravated murder as charged in the
15 indictment. It goes on to read, and/or, then another
16 asterisk with a blank, insert in ink, guilty or not
17 guilty, of the lesser included offense of involuntary
18 manslaughter. Stop there.

19 If your finding is one of
20 guilty to the offense of aggravated murder, you don't
21 answer the next question. That's it. That's your
22 verdict, guilty of aggravated murder. If your finding
23 is one of not guilty, according to my earlier
24 instructions, then you go and proceed and consider the
25 lesser included offense of involuntary manslaughter.

1 Attached to Count One,
2 Verdict in Count One is what we have referred to
3 throughout the case as the firearm specification.
4 Again it says, Count One, firearm specification. We,
5 the Jury, upon the issues joined in this case having
6 found the defendant, Weston Lee Howe, Junior, guilty
7 of Count One, do hereby further find that he, blank
8 space with an asterisk, the asterisk says: insert in
9 ink, did or did not have on or about his person or
10 under his control a deadly weapon, to-wit: a firearm
11 while committing said offense. If your finding as to
12 the substantive count is one of not guilty, then you
13 do not answer the question as to the firearm. You're
14 only talking about the firearm. If there's been a
15 guilty verdict on the substantive count, but they must
16 be separate findings.

17 Down below on both of these
18 forms -- I'm doing a little more detail, on Count One
19 than the other counts, essentially, the form is the
20 same -- we are going to make it -- essentially they're
21 all the same. Down below there are lines for 12
22 signatures. You must each of you sign the verdict
23 form in ink, all 12. We will talk about that in a
24 minute.

25 As it relates to Count Two,

1 again, the caption is State of Ohio against Weston Lee
2 Howe, Junior, Count Two, aggravated murder, again
3 parenthesis, Richard Blazer. We, the Jury, upon the
4 issues joined in this case, do find the defendant,
5 Weston Lee Howe, Junior, there is a blank with an
6 asterisk. Down below it says: insert in ink, guilty
7 or not guilty of the offense of aggravated murder as
8 charged in the indictment.

9 If your verdict is either
10 not guilty or you have not reached a verdict at all in
11 accordance with your earlier instructions, then you
12 proceed, and it says and/or, again asterisk, guilty or
13 not guilty of the lesser included offense of
14 involuntary manslaughter.

15 Attached to Count Two is
16 the firearm specification. Again, if there is a
17 finding of guilty on Count Two, the aggravated murder
18 charge, then you will answer the question on the
19 firearm specification. If your verdicts are those of
20 not guilty on Count Two, then you do not need to
21 answer the firearm specification. Again, signature
22 lines for 12 jurors. All 12 jurors must concur.

23 Count Three, State of Ohio
24 against Weston Lee Howe, verdict, Count Three,
25 aggravated robbery, in parenthesis so you know which

1 of the aggravated robberies you are referring to, Mark
2 McDonald, the form: We, the Jury, upon the issues
3 joined in this case, do find the defendant, Weston Lee
4 Howe, Junior, there is a space with an asterisk,
5 insert in ink, guilty or not guilty, of the offense of
6 aggravated robbery as charged in the indictment.

7 If your verdict is one of
8 guilty, then you again proceed to answer the
9 specification as to whether he did or did not have on
10 or about his person or under his control a deadly
11 weapon, to-wit: a firearm.

12 Count Four, aggravated
13 robbery, parenthesis, Richard Blazer, same caption:
14 We, the Jury, upon the issues joined in this case, do
15 find the defendant, Weston Lee Howe, Junior, again the
16 asterisk, insert guilty or not guilty of the offense
17 of aggravated robbery as charged in the indictment.

18 Attached thereto is also a
19 firearm specification. You will answer that question
20 the same as you did the others as to whether or not he
21 had a firearm at the time as previously defined by the
22 Court.

23 Count Five. State of Ohio
24 vs. Weston Lee Howe, Junior, verdict, Count Five,
25 aggravated burglary. Again, so you know which count

1 you're talking about in parenthesis, Richard Blazer:
2 We, the Jury, upon the issues joined in the case, do
3 find the defendant, Weston Lee Howe, Junior, blank
4 space, asterisk, insert in ink the word guilty or the
5 words not guilty of the offense of aggravated burglary
6 as charged in the indictment.

7 As in the other counts, the
8 attached firearm specification on Count Five, that
9 question would then, either did or did not have the
10 firearm in accordance with our prior discussions on
11 that particular issue.

12 AT SIDE BAR

13 THE COURT: First from the State.
14 Well, let the record
15 reflect that we've had these discussions in chambers.
16 Any additions or corrections to the instructions?

17 MR. SLAVENS: We have no additions.
18 We would like to apologize
19 to the Court for my comment in chambers about reading
20 the instructions.

21 However, there is, I think
22 an addition that needs to be made as to Counts One and
23 Two. I think the Court when it read from your source,
24 you put while committing or fleeing immediately after
25 committing.

1 THE COURT: Right.

2 MR. SLAVENS: But the indictment charges
3 attempting to commit. It does make a difference as to
4 Mr. Blazer 'cause there was no real theft offense.

5 THE COURT: All right.

6 MR. SLAVENS: But it is in the indictment
7 as to both.

8 MR. ARNTZ: I don't recollect just how
9 the Court read that particular charge.

10 THE COURT: I do. And I know that was
11 not put in there.

12 MR. ARNTZ: All right.

13 THE COURT: 'Cause I was reading, I
14 thought about that at the time I was doing that. I
15 quickly went right by it. Well, it doesn't make any
16 difference but since the State brought this to my
17 attention, I will just clarify that with the jury.

18 MR. SLAVENS: You want this language?
19 You want to keep this? It has this language in it.
20 Either one of them.

21 THE COURT: I will read it one time.

22 MR. SLAVENS: Right.

23 THE COURT: As it relates to both.

24 Okay. Now, Mr. Arntz,
25 anything in addition to what was said in chambers?